Supreme Court, U.S.
FILED

No. 01 4444 MAR 26 2002

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In The

Supreme Court of the United States

BEN CHAVEZ,

Petitioner,

vs.

OLIVERIO MARTINEZ,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit panel correctly characterized the Supreme Court's Fifth Amendment discussion in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), as non-binding dicta and thereby ignored its holding favorable to petitioner.

2. Whether a violation of the Fifth Amendment, potentially resulting in an award of civil damages, occurs at the time of the purported coercive interview or only when and if the state introduces the constitutionally violative statement in a criminal proceeding.

3. Whether the Ninth Circuit panel correctly held that the conduct of this investigating officer was so offensive as to deny him qualified immunity.

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Petitioner, Ben Chavez, respectfully requests a petition for writ of certiorari to issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") dated October 30, 2001, is reported at *Martinez v. City of Oxnard*, 270 F.3d 852 (9th Cir. 2001). The United States District Court issued an unreported decision dated August 1, 2000, granting respondent's motion for summary adjudication of his Fifth Amendment claim.

BASIS FOR JURISDICTION IN THIS COURT

The order denying the petition for rehearing and suggestion for rehearing en banc was entered on December 26, 2001.

The statutory provision conferring upon this Court jurisdiction to review on a writ of certiorari the judgment and order in question is 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In accordance with Supreme Court Rule 14(f), petitioner sets forth the constitutional provision and statute, in relevant part, involved in this case:

> No person . . . shall be compelled in any criminal case to be a witness against himself. . . .

U.S. Const., amend. V.

The statute at issue provides, in relevant part, as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . .

42 U.S.C. §1983.

STATEMENT OF THE CASE

The Ninth Circuit's published decision in *Martinez v. City of Oxnard*, 270 F.3d 852 (9th Cir. 2001), generally sets forth the facts of this case. Petitioner does not agree with the Ninth Circuit's determination of the length of the challenged interview.

As noted in the petition for rehearing and suggestion for rehearing en banc, filed in the Ninth Circuit on November 14, 2001, the decision contained an important misstatement of fact: "the interview lasted 45 minutes." 270 F.3d at 854. The record is clear that although petitioner was present in the emergency room for approximately 45 minutes, the total length of his interview of the respondent was in fact only 10 minutes and 7 seconds (excerpts of record, p. 451:10-14, and p. 4 of petition for rehearing.)

In the district court, respondent asserted that his Fourth Amendment and Fifth Amendment rights were violated by various police officers of the City of Oxnard. The Fourth Amendment theories of liability were predicated upon respondent having been shot by Oxnard police officers.

Following the shooting, police officers arranged for the transportation of the respondent to the local hospital, St. John's Regional Medical Center. Respondent had sustained large-caliber bullet wounds to his head and upper torso. Petitioner believed that respondent had very little

chance of survival, a belief which was reinforced by respondent's statement, "I am dying."

In the belief that respondent's account of the officer-involved shooting would soon die with him, petitioner tape-recorded his efforts over a ten-minute and seven-second time span to elicit respondent's version of events. Respondent's second theory of liability is that the interview was coercive and in violation of his Fifth Amendment right against self-incrimination.

Respondent moved for summary judgment as to both the Fourth Amendment and Fifth Amendment claims. The district court denied summary judgment as to the Fourth Amendment claim but granted respondent's summary judgment as to his Fifth Amendment claim.

Having asserted the defense of qualified immunity to the Fifth Amendment claim, petitioner sought interlocutory review. Respondent did not appeal the denial of his summary judgment as to the Fourth Amendment claim.

Following briefing and argument, the Ninth Circuit published its opinion, holding that: (1) statements by this Court that the Fifth Amendment right against self-incrimination was a trial right were dicta; (2) there was a private right of action for an alleged *Miranda* violation notwithstanding there was never a criminal proceeding in which the allegedly coerced statements were sought to be adduced by the state; and, finally, (3) the asserted parallels which the current facts bore to those in this Court's decision in *Mincey v. Arizona*, 437 U.S. 385 (1978),

foreclosed qualified immunity to the petitioner. The petition for rehearing and suggestion for rehearing en banc was denied on December 26, 2001.

REASONS FOR GRANTING THE WRIT

I.

A UNITED STATES COURT OF APPEALS HAS DECIDED AN IMPORTANT FEDERAL QUESTION WHICH CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

In order to reach its conclusion in this case that there is a private right of action for violation of the Fifth Amendment right against self-incrimination, even though the allegedly coerced statements are never introduced in any criminal proceeding, the Ninth Circuit characterized a number of pronouncements by this Court as *obiter dicta*. The Ninth Circuit stated, "We recognize the existence of Supreme Court dicta to the contrary." 270 F.3d at 857. The Ninth Circuit panel thereby declined to follow this Court's explanation of the Fifth Amendment right against self-incrimination as a fundamental trial right whose violation occurs only when the prosecutor attempts to introduce the allegedly coerced statement into evidence during some phase of a criminal proceeding.

The Ninth Circuit wrote, "Where the two [Supreme Court dicta and Ninth Circuit holdings] are at odds, however, we are bound to follow our own binding precedent rather than Supreme Court dicta." 270 F.3d at

857, n.3. The Ninth Circuit was referring to its two prior decisions (*Cooper v. Dupnik*, 963 F.2d 1220 (9th Cir. 1992), and *California Attorneys for Criminal Justice v. Butts*, 195 F.3d 1039 (9th Cir. 1999)), which held that there was a private right of action for violation of the Fifth Amendment even if the inculpatory statements were never sought to be introduced in any criminal proceeding.

The suggestion for rehearing en banc, pages 16-20, urged the Ninth Circuit to reconsider its ruling en banc because of the erroneous characterization of numerous pronouncements by this Court as mere dicta. The Ninth Circuit refused to do so.

It is second nature, when approaching *Fourth* Amendment violations, to assume that the time of the conduct is also the time of the violation. But the Ninth Circuit erred in applying this temporal analysis to the *Fifth* Amendment. A careful review of the text of the Fifth Amendment, in combination with numerous pronouncements by this Court, reveals that the Fifth Amendment provides a criminal proceeding protection as opposed to a generalized private right of action.

The text of the Fifth Amendment is the starting point of the analysis. The Fifth Amendment confines its application to "any criminal case." The protection is against a person being compelled "in any criminal case" to be a witness against himself. In contrast, the Fourth Amendment speaks emphatically and without limitation, providing that the right of the people to be secure in their

persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated.

The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental *trial* right of criminal defendants. *Malloy v. Hogan*, 378 U.S. 1 (1964). Although conduct by law enforcement officials prior to trial may ultimately impair that right, the constitutional violation occurs only at trial. *Kastigar v. United States*, 406 U.S. 441, 453 (1972).

The Fourth Amendment functions differently. That amendment prohibits all unreasonable searches and seizures, whether or not the evidence is ever sought to be used in a criminal proceeding. A violation of the Fourth Amendment is considered fully accomplished at the time of an unreasonable governmental intrusion. *United States v. Calandra*, 414 U.S. 338, 354 (1974); *United States v. Leon*, 468 U.S. 897, 906 (1984).

Decisions of this Court have repeatedly limited the protection of the Fifth Amendment to criminal prosecutions. In *Withrow v. Williams*, 507 U.S. 680, 691 (1993), the Court wrote, "Prophylactic though it may be, in protecting a defendant's Fifth Amendment privilege against self-incrimination, *Miranda* safeguards a fundamental *trial* right." [Emphasis in original text.]

This Court conducted a searching, comprehensive examination of the issue in *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264-267 (1990). The amendment being applied in that case was the Fourth Amendment;

nevertheless, the depth of elaboration in the decision makes plain that the Court's reasoning was to compare and contrast the two amendments in order to reach the appropriate conclusion to that case. The Ninth Circuit declined to follow the detailed explanation of this Court on the ground that it was allegedly dicta. Comprehensive discussions of the Bill of Rights contained in the majority opinion of the United States Supreme Court should not be disregarded as dicta.

In *Verdugo-Urquidez*, this Court stated that "Before analyzing the scope of the Fourth Amendment, we think it significant to note that it operates in a different manner than the Fifth Amendment . . . ." 494 U.S. at 264. The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants. It is a right which is properly asserted only during trial and only by defendants in a pending criminal proceeding. *Id.* Even though law enforcement conduct "prior to trial" may be constitutionally violative, "a constitutional violation occurs only at trial." *Id.*

At page 265 the Court explained that contrary to the suggestion of amici curiae that the drafters of the Bill of Rights used the phrase "the people" simply to avoid an awkward rhetorical redundancy, the phrase "the people" seems to have been a term of art employed only in select parts of the Constitution. For example, the Preamble to the Constitution declares that the Constitution was ordained and established by "the people of the United States," and various amendments, such as the Second, Fourth, Ninth, and Tenth, confer rights upon "the people." The language

of those amendments contrasts with the words of the Fifth and Sixth Amendments, which limit themselves to regulating procedure in criminal cases by using the terms "person" and "accused."

The Ninth Circuit's view that a Fifth Amendment private right of action arises at the time of the alleged violation even in the absence of any criminal proceeding is further contradicted by this Court's decision in *Dickerson v. United States*, 530 U.S. 428 (2000). The issue in *Dickerson* was whether a congressional enactment could abrogate the requirement of the *Miranda* warnings.

This Court held that the *Miranda* warning-based approach to determining the admissibility of statements made by an accused during a custodial interrogation was constitutionally based and could not be overruled by legislation. In describing its holding in *Dickerson*, the Court stated in the opening paragraph, "We therefore *hold* that *Miranda* and its progeny in this Court govern the *admissibility* of statements made during custodial interrogation in both state and federal courts." *Id.* at 432 [emphasis added].

Many statements in the *Dickerson* opinion clarify that the Fifth Amendment right is strictly a trial right whose violation does not occur until the state attempts to admit the statement into evidence during a criminal proceeding. The *Dickerson* court explained, "We have never abandoned this due process jurisprudence, and thus continue to exclude confessions that were obtained involuntarily," and "Those guidelines established that the admissibility in

evidence of any statement given during custodial interrogation of a suspect would depend on whether the police provided the suspect with four warnings." 530 U.S. at 434, 435.

Dickerson clarifies that the Fifth Amendment's self-incrimination clause, incorporated into the due process clause of the Fourteenth Amendment and thus applied to the state, is designed to prevent a person from being compelled to incriminate himself — an event which can only occur during a prosecutorial proceeding in which jeopardy attaches. No jeopardy attaches until the state attempts to convict a person of a charged criminal offense. In the instant case, respondent was never charged with any crime, nor is there any contention that the statements thus elicited were sought to be introduced against him in any criminal proceeding. Thus, on these facts, civil liability against the petitioner should not result.

II.

A UNITED STATES COURT OF APPEALS HAS ISSUED A DECISION IN CONFLICT WITH THE DECISION OF ANOTHER UNITED STATES COURT OF APPEALS ON THE SAME IMPORTANT MATTER.

In contrast with the Ninth Circuit's decision, 270 F.3d at 857, n.3, the Seventh Circuit has held that a violation of the Fifth Amendment right against self-incrimination occurs only at the time of attempted introduction into

evidence during a criminal proceeding of the allegedly coerced statements. The Seventh Circuit stated:

> But was Mahoney's right not to be compelled to incriminate himself violated? No incriminating statement was made by Mahoney, let alone used against him in a legal proceeding, and we have said that the Fifth Amendment does not forbid the forcible extraction of information but only the use of information so extracted as evidence in a criminal case — otherwise, immunity statutes would be unconstitutional.

Mahoney v. Kesery, 976 F.2d 1054, 1061-1062 (7th Cir. 1992).

III.

A UNITED STATES COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

One of the most important avenues of information-gathering for police officers is questioning witnesses to potential criminal offenses, witnesses who may often be suspects or defendants. This Court has never addressed the issue of qualified immunity as that doctrine applies to

questioning in a hospital environment. No extant Supreme Court decision addresses the civil implications of the *Mincey* decision or whether substantial deviations from the constitutionally offensive conduct which occurred in *Mincey* call the qualified immunity into play.

The rule of qualified immunity provides ample support to all but the plainly incompetent or those who knowingly violate the law. *Burns v. Reed*, 500 U.S. 478, 494-95 (1991). Even conduct constitutionally violative may provide protection for the individual officer if constructive notice of its unconstitutionality has not been provided by previously decided, closely correspondent precedent. *Wilson v. Layne*, 526 U.S. 603, 609 (1999).

Petitioner is entitled to qualified immunity because the present facts are far less aggravated than those criticized by this Court in *Mincey*. The Ninth Circuit denied petitioner qualified immunity, saying that his interview was more egregious than the one in *Mincey*, but that is not true. There was a cogent reason for interviewing the respondent (to preserve the account of a moribund key witness to an officer-involved shooting). By contrast, no justification other than eliciting a criminal confession from a recovering surgical patient existed in *Mincey*.

In *Mincey*, the interviewee asked "repeatedly that the interrogation stop until he could get a lawyer." 437 U.S. at 396. The text of the interview is set out in the margin at 399, and it appears that there were at least three separate requests for a lawyer. A possible fourth request for a lawyer appears in the text of the *Mincey* decision at 399.

The *Mincey* court underscored the requests to see a lawyer (437 U.S. at 399), presumably because of the primacy of the legal ombudsman to the operation of our system of law. The *Mincey* court emphasized the temporal proximity of the request for counsel to the questions turning to the details of the afternoon's events. As soon as the *Mincey* detective asked about the afternoon's events, the interviewee immediately stated, "This is all I can say without a lawyer."

The hallmark of coercive interrogation decisions is the disregarded request for counsel, which is wholly nonexistent in the current factual setting. Respondent never once asked to see a lawyer, nor did he request any intermediary or ombudsman, such as a priest, parent, or spouse. The absence of any request for counsel in the present facts belies the Ninth Circuit's observation at 270 F.3d 858 that "to the extent Sgt. Chavez's conduct differs from that of the officers in *Mincey*, it is more egregious."

One of the aggravating features of the *Mincey* facts was the enlistment of medical personnel to assist in breaking down the interviewee's will to resist. At 437 U.S. 399, the decision recites that "a nurse who was present suggested it would be best if Mincey answered." No doubt it is very frightening to a seriously injured person to have the very people who are entrusted with his care turn into the confederates of the state.

The present facts have no analogue to that whatsoever. At no time nor in any way did petitioner

attempt to enlist the assistance of the medical personnel attending the respondent, nor did any medical personnel present in the emergency room make any statement which indicated that respondent should cooperate with the interviewer.

A third factual feature separating the present facts from those held constitutionally violative in *Mincey* was the duration of the interview, which in *Mincey* was four hours, from 8:00 p.m. until midnight. 437 U.S. at 396. In contrast, the interview length in the present case was ten minutes and seven seconds. Coercive interrogations are frequently marked by the length of the examination. This difference, in and of itself, strongly contraindicates an overbearing of will.

Also belying the Ninth Circuit's pronouncement that petitioner's conduct was more egregious than that involved in *Mincey* is the fact that the interview in *Mincey* took place in a recovery room (with virtually no one else present), so that the interviewee was "at the complete mercy" of the interrogator. 437 U.S. at 396, 399. In the present case, the interview took place in a busy emergency room with numerous medical personnel in attendance.

This Court has ruled that the presence of non-police personnel substantially dissipates the coerciveness of the environment. *Berkemer v. McCarty*, 468 U.S. 420, 438-439 (1984). If a detention occurs in view of non-police witnesses, public exposure reduces the likelihood that law enforcement agents will use oppressive or abusive tactics and renders the situation substantially less police

dominated. Other courts have reasoned that if the mere presence of uninvolved passersby, such as in *Berkemer*, renders the environment substantially less police dominated, then the presence of medical personnel whose sworn duty is to care for their patient even more strongly dissipates the coerciveness of an environment. *Wilson v. Coon*, 808 F.2d 688, 690 (8th Cir. 1987); *United States v. Kahlil*, 214 F.3d 111, 121 (2d Cir. 2000); *Campaneria v. Reid*, 891 F.2d 1014, 1020 (2d Cir. 1989).

In the *Mincey* case, the detective did not create any contemporaneous record of the interview, suggesting he was perhaps trying to conceal the degree of coercion. In the present case, petitioner tape-recorded the entirety of the interview. He was not trying to hide anything but, rather, to preserve a moribund key witness's account of recent important events.

In *Mincey*, the interviewee was in no danger of death. He was removed from the emergency room and placed in the intensive care unit; he had sustained a wound to his hip, resulting in damage to his sciatic nerve and partial paralysis of his right leg. The present case, in sharp contrast, has the only non-police witness to an officer-involved shooting in imminent danger of expiration.

At no time did petitioner threaten respondent in any way. He did not state that respondent was going to be arrested or prosecuted or that medical care would be discontinued if he failed to respond to the inquiries.

The great majority of petitioner's questions were not leading or accusatory but were merely designed to elicit respondent's version of events (petitioner asked respondent questions such as "Oliverio — what happened? Oliverio — tell me what happened. What happened, sir? Oliverio, sir, what happened?"). In contrast, the detective in *Mincey* posed a lengthy series of pointedly inculpatory accusations, such as "How did [you] get into the apartment?" . . . . "Did you sell some narcotics to the guy that was shot?" . . . . "Did you give him a sample?" . . . . "A small amount of drug or narcotic to test?" . . . . "Did you shoot anyone?"

One of the salient features of *Mincey* was that the interviewee was not mentally competent, fading in and out of consciousness, giving answers which on their face were not coherent, and periodically actually losing consciousness. The interviewee in *Mincey* was confused to the point that he was unable to think clearly about either the events of that afternoon or the circumstances of his interview. In contrast, the respondent was lucid throughout the interview and never expressed any hallucinations or statements indicating that he was confused or unable to think clearly; his responses made sense.

In *Mincey*, the interviewee's will was undermined by forcing him to write the answers on pieces of paper provided by the hospital. The only contemporaneous record consisted of Mincey's written answers. In the present case, petitioner was Spanish speaking and conducted the interview entirely in respondent's native language.

A number of other features substantially reduced the coerciveness of the questions. At no time did petitioner interfere with the provision of medical care to the respondent. Petitioner was the only police officer who questioned respondent and was the only police officer present in the emergency room (another officer briefly entered to ask petitioner a question and promptly departed). Petitioner never placed respondent under arrest, nor did he ever make any physical contact with respondent. At no time did respondent ever ask petitioner to leave. At no time did petitioner raise his voice or scream or yell at respondent.

In contrast with the Ninth Circuit decision, other courts have held that police interviews of seriously injured individuals in a medical setting are not constitutionally violative. In *United States v. Kahlil, supra,* 214 F.3d 111, a criminal defendant appealed his conviction of participation in a bomb plot by contending that the district court erred in denying his pretrial motion to suppress certain post-arrest statements which he made and in admitting those statements in trial. Following a raid on his apartment, officers questioned him at the hospital about the construction and stability of bombs which they suspected that he helped build or store. He was not given *Miranda* warnings, nor was he told that he had any right to refuse to respond.

The defendant in *Kahlil* moved to suppress his responding statements on the grounds that no *Miranda* warnings were given to him and that his physical condition, as he was being prepared for life-saving surgery, prevented

his answers from being knowing and voluntary. The Second Circuit affirmed the denial of his suppression motion. While his medical condition was grave, it was not such as to prevent his statements from being knowing and voluntary.

In *Campaneria v. Reid, supra,* 891 F.2d 1014, the arrestee was relatively young and foreign-born, with a poor command of the English language. During questioning, he was suffering from a serious knife wound and was in significant pain. The police questioned him at the hospital in the intensive care unit. During questioning, with tubes running in and out of his body, he complained of dizziness.

Despite relentless questioning by multiple police interrogators, the Second Circuit held that the interviewee was not coercively examined. He was generally alert and awake despite his pain. Although there were many interviews, they were all relatively short.

CONCLUSION

Petitioner urges the Court to grant certiorari because the Ninth Circuit decision (1) conflicts with relevant decisions of this Court; (2) conflicts with decisions from other courts on the same subject; and (3) provides an opportunity for this Court to settle the law on an important issue. Also, petitioner contends, for all the reasons stated herein, that the Ninth Circuit's conclusion that the facts in this case are more egregious than in *Mincey* is simply wrong. Under the instant circumstances, petitioner's

conduct should be protected from civil liability by the reasonable and fair application of the doctrine of qualified immunity.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED OCTOBER 30, 2001

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

OLIVERIO MARTINEZ, *Plaintiff–Appellee,* v. CITY OF OXNARD; OXNARD POLICE DEPARTMENT; ART LOPEZ, Chief; MARIA PEÑA; ANDREW SALINAS; RON ZAVALA, *Defendants,* and BEN CHAVEZ, *Defendant–Appellant.*	)	Case No. 00-56520 D.C. No. CV-98-09313-FMC OPINION

Appeal from the United States District Court
for the Central District of California
Florence Marie Cooper, District Judge, Presiding

Argued and Submitted
June 11, 2001 — Pasadena, California

Filed October 30, 2001

Before: Kim McLane Wardlaw, Richard A. Paez
and Richard C. Tallman, Circuit Judges.

TALLMAN, Circuit Judge:

We must determine whether a police officer who conducts a coercive, custodial interrogation of a suspect who is being treated for life-threatening, police-inflicted gunshot wounds may invoke qualified immunity in a civil suit for damages under 42 U.S.C. §1983 (2001). Under the circumstances of this case, we hold he may not.

I

On November 28, 1997, police officers Maria Pena and Andrew Salinas were investigating narcotics activity near a vacant lot in a residential area of Oxnard, California. While questioning one individual, they heard a bicycle approaching on the darkened path that traversed the lot. Officer Salinas ordered the rider, Oliverio Martinez, to

stop, dismount, spread his legs, and place his hands behind his head. Martinez complied.

During a protective pat-down frisk, Officer Salinas discovered a knife in Mr. Martinez's waistband. Officer Salinas alerted his partner and pulled Martinez's hand from behind his head to apply handcuffs. Officer Salinas claims that Martinez pulled away from him. Martinez alleges that he offered no resistance. Either way, Officer Salinas tackled Martinez and a struggle ensued.

Both officers testified that during the struggle Martinez did not attempt to hit or kick them; Officer Salinas struck the only blow. The officers maintain that Martinez drew Officer Salinas's gun and pointed it at them. Martinez alleges that Officer Salinas began to draw his gun and that Martinez grabbed Officer Salinas's hand to prevent him from doing so.

All parties agree that Officer Salinas cried out, "He's got my gun." Officer Pena drew her weapon and fired several times. One bullet struck Martinez in the face, damaging his optic nerve and rendering him blind. Another bullet fractured a vertebra, paralyzing his legs. Three more bullets tore through his leg around the knee joint. The officers then handcuffed Martinez.

The patrol supervisor, Sergeant Ben Chavez, arrived on the scene minutes later along with paramedics. While Sergeant Chavez discussed the incident with Officer Salinas, the paramedics removed the handcuffs so they could stabilize Martinez's neck and back and loaded him

into the ambulance. Sergeant Chavez rode to the emergency room in the ambulance with Martinez to obtain his version of what had happened.

As emergency room personnel treated Martinez, Sergeant Chavez began a taped interview. Chavez did not preface his questions by reciting *Miranda* warnings. The interview lasted 45 minutes. The medical staff asked Chavez to leave the trauma room several times, but the tape shows that he returned and resumed questioning. Chavez turned off the tape recorder each time medical personnel removed him from the room. The transcript of the recorded conversation totals about ten minutes and provides an incontrovertible account of the interview.

Sergeant Chavez pressed Martinez with persistent, directed questions regarding the events leading up to the shooting. Most of Martinez's answers were non-responsive. He complained that he was in pain, was choking, could not move his legs, and was dying. He drifted in and out of consciousness. By the district court's tally, "[d]uring the questioning at the hospital, [Martinez] repeatedly begged for treatment; he told [Sergeant Chavez] he believed he was dying eight times; complained that he was in extreme pain on fourteen separate occasions; and twice said he did not want to talk any more." Chavez stopped only when medical personnel moved Martinez out of the emergency room to perform a C.A.T. scan.

Martinez filed a complaint under 42 U.S.C. § 1983 alleging that the officer defendants violated his constitutional rights by stopping him without probable

cause, using excessive force, and subjecting him to a coercive interrogation while he was receiving medical care. He moved for summary judgment on each of his claims. The district court denied Sergeant Chavez's defense of qualified immunity and granted summary judgment for Martinez on his claim that Chavez violated his Fifth and Fourteenth Amendment rights by coercing statements from him during medical treatment.[1] In this interlocutory appeal, Chavez argues that the district court erred by holding that he was not entitled to qualified immunity.

II

We have jurisdiction over Sergeant Chavez's interlocutory appeal of the purely legal question whether he is entitled to qualified immunity. *Mitchell v. Forsyth*, 472 U.S. 511, 528, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). We review de novo the district court's determination on summary judgment that Chavez cannot invoke qualified immunity as a bar to civil litigation. *Robinson v. Prunty*, 249 F.3d 862, 865-66 (9th Cir.2001). For the purposes of this interlocutory appeal, we must accept as true the facts alleged by Martinez and determine whether Chavez is nonetheless entitled to qualified immunity as a matter of law. *Id.* at 866.

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[1]The district court denied summary judgment on Martinez's claims that he was improperly stopped by the police and that they used excessive force against him. Those claims will be tried to a jury.

[1] Section 1983 permits an individual whose federal constitutional or statutory rights have been violated by a public official acting under color of state law to sue the official for damages. Public officials are afforded protection, however, "from undue interference with their duties and from potentially disabling threats of liability." *Harlow v. Fitzgerald*, 457 U.S. 800, 806, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). Qualified immunity shields them "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818, 102 S.Ct. 2727. Only conduct that an official could not reasonably have believed was legal under settled law falls outside the protective sanctuary of qualified immunity. *Hunter v. Bryant*, 502 U.S. 224, 227, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991) (per curiam).

To determine whether Sergeant Chavez is entitled to qualified immunity, we must first determine whether Martinez has stated a *prima facie* claim that Chavez violated one of his constitutional rights. *Saucier v. Katz*, 533 U.S. 194, ____, 121 S.Ct. 2151, 2155, 150 L.Ed.2d 272 (2001). If we determine that Martinez has stated a *prima facie* case, then we must determine whether the right allegedly violated was clearly established by federal law. *Id.* We hold that Chavez violated the Fifth and Fourteenth Amendments by subjecting Martinez to a coercive, custodial interrogation while he received treatment for life-threatening gunshot wounds inflicted by other police officers.

[2] In *Brown v. Mississippi*, 297 U.S. 278, 286, 56 S.Ct. 461, 80 L.Ed. 682 (1936), a unanimous Supreme Court condemned police officers' use of violence to coerce confessions from criminal suspects as "revolting to the sense of justice" embodied in the Constitution. Although the coercive tactics employed by the police in *Brown* involved physical violence, the Court clarified in subsequent opinions that the Fifth and Fourteenth Amendments also proscribe more subtle forms of police coercion. See *Haynes v. Washington*, 373 U.S. 503, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1963) (holding that a confession obtained by refusing to let a suspect contact his wife was coercive and, therefore, unconstitutional); *Lynumn v. Illinois*, 372 U.S. 528, 83 S.Ct. 917, 9 L.Ed.2d 922 (1963) (holding that a confession obtained by threatening a suspect with the loss of custody of her children was coercive and, therefore, unconstitutional); *Ashcraft v. Tennessee*, 322 U.S. 143, 64 S.Ct. 921, 88 L.Ed. 1192 (1944) (holding that prolonged interrogation without rest or contact with individuals other than law enforcement officers was coercive and, therefore, unconstitutional).[2]

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[2]Each of these cases holds that a coerced confession violates the Fourteenth Amendment and may therefore not be admitted at trial as evidence. None of them establishes a civil remedy for violation of the Fourteenth Amendment. *But see Cooper v. Dupnik*, 963 F.2d 1220, 1244-45 (9th Cir.1992) (en banc), *cert. denied*, 506 U.S. 953, 113 S.Ct. 407, 121 L.Ed.2d 332 (1992). Section

(continued...)

[3] Chief Justice Warren observed in *Blackburn v. Alabama*, 361 U.S. 199, 206, 80 S.Ct. 274, 4 L.Ed.2d 242 (1960), that "coercion can be mental as well as physical, and ... the blood of the accused is not the only hallmark of an unconstitutional inquisition." A police officer's extraction of a confession is unconstitutional if, "considering the totality of the circumstances, the [officer] obtained the statement by physical or psychological coercion or by improper inducement so that the suspect's will was overborne." *United States v. Coleman*, 208 F.3d 786, 791 (9th Cir.2000) (quotations and citation omitted); *see also Withrow v. Williams*, 507 U.S. 680, 689, 113 S.Ct. 1745, 123 L.Ed.2d 407 (1993).

[4] Martinez argues that, considering the totality of the circumstances, Sergeant Chavez's interrogation was coercive and that it therefore violated the Fifth and Fourteenth Amendments. Chavez's coercive, custodial questioning violated the plaintiff's substantive Fifth Amendment right against compulsory self-incrimination. *Cooper*, 963 F.2d at 1235. Under *Cooper*, a Fifth Amendment violation occurs when a police officer coerces self-incriminating statements from a suspect in custody.

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[2](...continued)
1983 requires only that the right, not the remedy, be established. Indeed, Congress's purpose in enacting §1983 was to create a novel civil remedy for violation of established constitutional rights. See *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617-18, 99 S.Ct. 1905, 60 L.Ed.2d 508 (1979).

Id. at 1236-37, 1242-44. The plaintiff in that case stated a cause of action under §1983 for violation of his Fifth Amendment right against self-incrimination by alleging that police officers used deception and psychological coercion to extract statements from him. *Id.* at 1242-43. Sitting *en banc*, we hold that the officers' conduct violated the Fifth Amendment even though the plaintiff was never prosecuted, noting that the Fifth Amendment's purpose is to prevent coercive interrogation practices that are "destructive of human dignity." *Id.* at 1239 (quoting *Miranda v. Arizona*, 384 U.S. 436, 457-58 (1966)). We echoed the Supreme Court's holding in *Miranda* that this animating purpose was adequately achieved only if the Fifth Amendment cast its protection against coerced self-incrimination not just over the courthouse, but also over the jailhouse, the police station, and other settings in which law enforcement authority was invoked to curtail a criminal suspect's freedom of action in any significant way. *Id.* at 1239.

[5] Here, as in *Cooper*, a police officer's conduct "actively compelled and coerced" a plaintiff to utter statements that the plaintiff could reasonably believe might be used in a criminal prosecution or lead to evidence that might be so used. *Id.* at 1243; *see also Kastigar v. United States*, 406 U.S. 441, 445, 32 L. Ed. 2d 212, 92 S. Ct. 1653 (1972) (holding that the Fifth Amendment "protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used"). Even though Martinez's statements were not used against him in a criminal proceeding, Chavez's coercive questioning

violated Martinez's Fifth Amendment rights. *Cooper*, 963 F.2d at 1237; see also *California Attorneys for Criminal Justice v. Butts*, 195 F.3d 1039, 1047-49 (9th Cir. 2000) (holding that *Miranda* and its progeny establish clearly and unequivocally that coercive, custodial interrogation violates the Fifth Amendment).[3] We affirm the district court's holding that Officer Chavez cannot invoke qualified immunity as a defense to Martinez's Fifth Amendment claims.

[6] Likewise, a police officer violates the Fourteenth Amendment when he obtains a confession by coercive conduct, regardless of whether the confession is subsequently used at trial.

> The due process violation caused by coercive behavior of law-enforcement

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[3]We recognize the existence of Supreme Court dicta to the contrary. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 264, 110 S.Ct. 1056, 108 L.Ed.2d 222 (1990) ("The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants. Although conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial."). Where the two are at odds, however, we are bound to follow our own binding precedent rather than Supreme Court dicta. *See Ayala v. United States*, 550 F.2d 1196, 1200 (9th Cir.1977) (holding that Supreme Court dicta is not binding).

> officers in pursuit of a confession is *complete with the coercive behavior itself.... The actual use or attempted use of that coerced statement in a court of law is not necessary to complete the affront to the Constitution.*

Cooper v. Dupnik, 963 F.2d at 1244-45 (emphasis added). Mr. Martinez has thus stated a *prima facie* case that Sergeant Chavez violated his Fifth and Fourteenth Amendment rights to be free from police coercion in pursuit of a confession.

[7] We must now determine whether the rights that Martinez alleges Chavez violated were clearly established by federal law.

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has been previously held unlawful, but it is to say that in light of pre-existing law the unlawfulness must be apparent.

Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) (internal citations omitted). We must determine, in other words, whether a reasonable officer in Sergeant Chavez's position would have known that his conduct violated Martinez's Fifth and Fourteenth

Amendment rights to be free from coercive interrogation. Because "whether [a] confession was obtained by coercion or improper inducement can be determined only by an examination of all of the attendant circumstances," *Haynes*, 373 U.S. at 513, 83 S.Ct. 1336, our holding will necessarily be a narrow one confined to the specific facts of this case. Nor do we opine on the appropriate measure of damages for such a violation; that is for the jury to decide. *See Cooper*, 963 F.2d at 1245 ("[T]he fact that [the suspect] never formally was charged in court and none of his statements ever were offered in evidence to his potential detriment is relevant only to damages, not to whether he has a civil cause of action in the first place.").

[8] The record before us reveals that Sergeant Chavez doggedly pursued a statement by Martinez despite being asked to leave the emergency room several times. He ignored Martinez's pleas to withhold questioning until he had received medical treatment. A reasonable officer, questioning a suspect who had been shot five times by the police and then arrested, who had not received *Miranda* warnings, and who was receiving medical treatment for excruciating, life-threatening injuries that sporadically caused him to lose consciousness, would have known that persistent interrogation of the suspect despite repeated requests to stop violated the suspect's Fifth and Fourteenth Amendment right to be free from coercive interrogation.

The Supreme Court held a virtually indistinguishable interrogation unconstitutional in *Mincey v. Arizona*:

> [The officer] ceased the interrogation only during intervals when [the suspect] lost consciousness or received medical treatment, and after each such interruption returned relentlessly to his task. The statements at issue were thus the result of virtually continuous questioning of a seriously and painfully wounded man on the edge of consciousness.

437 U.S. 385, 401, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978); *but cf. United States v. George*, 987 F.2d 1428, 1430-31 (9th Cir.1993) (holding that interrogation in the hospital of a coherent suspect who has received *Miranda* warnings is not unconstitutional); *United States v. Lewis*, 833 F.2d 1380, 1384 (9th Cir.1987) (holding voluntary a statement elicited from a suspect just after she returned from surgery and emerged from the effects of general anesthetic where the suspect was alert, responsive, and unresisting).

To the extent Sergeant Chavez's conduct differs from that of the officers in *Mincey*, it is more egregious. Sergeant Chavez did not read Martinez his *Miranda* warnings. *See Davis v. North Carolina*, 384 U.S. 737, 740, 86 S.Ct. 1761, 16 L.Ed.2d 895 (1966) ("[T]hat a defendant was not advised of his right to remain silent or of his right respecting counsel at the outset of interrogation ... is a significant factor in considering the voluntariness of statements later made."); *Miranda*, 384 U.S. at 467, 86 S.Ct. 1602 ("[W]ithout proper safeguards the process of in-custody interrogation ... contains inherently compelling pressures which work to undermine the individual's will to

resist and to compel him to speak where he would not otherwise do so freely."). Chavez persisted in questioning Martinez during, not after, medical treatment. Although Martinez did not, like Mincey, affirmatively request counsel, he repeatedly requested that Sergeant Chavez refrain from interviewing him until his medical treatment was complete and his life was no longer in danger.

[9] In light of the extreme circumstances in this case, a reasonable police officer in Sergeant Chavez's position could not have believed that the interrogation of suspect Martinez comported with the Fifth and Fourteenth Amendments. Accordingly, the district court did not err by holding that on these facts qualified immunity was not available to Chavez to insulate him from Martinez's civil rights suit for damages.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION FILED AUGUST 1, 2000

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

OLIVERIO MARTINEZ,	)	CV 98-9313 FMC (AJWx)
	)	
Plaintiff,	)	
	)	**ORDER GRANTING**
vs.	)	**IN PART AND**
	)	**DENYING IN PART**
CITY OF OXNARD, et al.,	)	**PLAINTIFF'S**
	)	**MOTION FOR**
Defendants.	)	**SUMMARY**
	)	**ADJUDICATION**
	)	

I. Introduction

Plaintiff filed a complaint under 42 U.S.C. §1983 alleging that the individual officer defendants violated his constitutional rights by stopping him without probable

cause, using excessive force and interrogating him while he was receiving medical care. Plaintiff's complaint also alleged that: the City failed to train the officers, the individual officers acted pursuant to a policy or custom of the City of Oxnard, defendants battered plaintiff and defendants acted negligently. These claims, enumerated as plaintiff's second, third, fourth, and fifth claims for relief, as well as all claims against defendants Lopez and Hurtt, were dismissed by stipulation. Plaintiff moved for summary adjudication on his remaining claims for damages against the individual officers under §1983.

Plaintiff's motion does not comply with several of the requirements of the Local Rules of the Central District of California. Most importantly, plaintiff's counsel did not comply with Local Rule 7.4.1's requirement that twenty days before filing a noticed motion, "counsel contemplating the filing of any motion shall contact opposing counsel to discuss thoroughly, preferably in person, the substance of the contemplated motion." Plaintiff's counsel's letter, mailed twenty-one days before the motion was filed presented no opportunity for counsel to "discuss thoroughly" the contemplated motion. In addition, plaintiff's papers do not conform to the typeface size requirements of Local Rule 3.4.1. Failure to comply with the important procedural requirements of the local rules may result in denial of the motion or monetary sanctions. *See* Local Rule 27. Although plaintiff's motion is procedurally defective, in the interest of judicial economy, the Court issues the following decision:

II. Standard for Summary Adjudication

Plaintiff's motion for summary adjudication seeks rulings from the Court on several issues: that the questioning of plaintiff by Chavez violated plaintiff's Fifth and Fourteenth Amendment rights; that plaintiff's statements in the hospital are untrustworthy because plaintiff was not competent; that Chavez violated plaintiff's Eighth Amendment rights by interrogating him at the hospital; and that plaintiff's stop and detention violated his Fourth Amendment rights. Defendants correctly point out that plaintiff cannot seek adjudication of "issues" under Federal Rule of Civil Procedure 56. Instead, partial summary judgment or summary adjudication is available only for an entire "claim." Accordingly, the Court treats the motion as one for summary adjudication of defendants' liability for plaintiff's §1983 claims for violations of the Fourth, Fifth, Eighth and Fourteenth Amendments.

Summary adjudication is only proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, snhow that there is no issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. Rule Civ. Proc. 56(b); *see also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 586-87 (1986). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986).

III. Factual Background

Plaintiff alleges that: he was riding his bicycle home at approximately 7:00 p.m. on November 28, 1997, when defendant officers Peña and Salinas stopped him without probable cause; although plaintiff complied with Salinas' orders, Salinas jumped on top of him after conducting a pat down search; although plaintiff was wearing the knife he used for work at the time, he did not attempt to remove it from its sheath; while plaintiff and Salinas were struggling on the ground, Peña approached and shot plaintiff in the temple, the abdomen and the knee.

Defendants contend that: while investigating reports of drug activity, Peña and Salinas saw plaintiff approach on his bicycle; because they believed the area he was riding in was an enclosed field, they asked plaintiff to stop so they could ask him about the reported drug activity; Salinas ordered plaintiff to get off of his bicycle and put his hands behind his head and Plaintiff complied; Salinas performed a pat down search and discovered plaintiff's knife; Salinas contends that plaintiff made a "furtive" movement toward the knife which he countered by forcing plaintiff to the ground; as the two struggled, Peña approached; during the struggle, plaintiff removed Salinas' gun from its holster and began pointing it at both defendants; Peña shot plaintiff in response.

Parties agree that the following occurred: Peña shot plaintiff; plaintiff was taken to the hospital; while plaintiff was being treated and prepared for surgery, Officer Chavez questioned plaintiff; and plaintiff stated to Chavez that he

grabbed Salinas' gun. Plaintiff was not charged with a crime as a result of the incident.

IV. Plaintiff's Constitutional Claims

A. Questioning of Plaintiff at the Hospital

As noted above, there is no dispute that Chavez questioned plaintiff at the hospital. Plaintiff contends that Chavez violated plaintiff's Fifth and Fourteenth Amendment rights when Chavez extracted from him a statement that was a product of coercion.

1. Voluntariness of Plaintiff's Statement to Chavez

In determining the voluntariness of a confession, the Court must determine "whether, under the totality of the circumstances, the challenged confession was obtained in a manner compatible with the requirements of the Constitution." *Collazo v. Estelle*, 940 F.2d 411, 415 (9th Cir. 1991). A statement is involuntary if it is extracted by threats or violence or the exertion of any improper influence. *See United States v. Bautista-Avila*, 6 F.3d 1360, 1364 (9th Cir. 1993). "The test is whether, considering the totality of the circumstances, the government obtained the statement by physical or psychological coercion or by improper inducement so that the suspect's will was overborne." *Derrick v. Peterson*, 924 F.2d 813, 817 (9th Cir. 1990). The question of whether a confession is voluntary is a matter of law. *See United States v. D.F.*, 115 F.3d 413, 418 (7th Cir. 1997).

A statement may be found involuntary, even if made when the party was not in custody. *See U.S. v. Eccles*, 850 F.2d 1357, 1361 n.2 (9th Cir. 1988). The requirement that statements, to be admissible, must be voluntary, is based on both the right against self-incrimination and the standards of due process. *See Oregon v. Elstad*, 470 U.S. 298, 304 (1985). Involuntary statements are inherently untrustworthy, and their use violates our fundamental sense of decency. *See Spano v. New York*, 360 U.S. 315, 320 (1959). Therefore, a statement found to be involuntary may be excluded from both criminal and civil proceedings. *See Watkins v. Sowders*, 449 U.S. 341, 347 (1981) (an involuntary confession is inadmissible in part because such a confession is likely to be unreliable); Federal Rule of Evidence 403.

In examining the totality of the circumstances, the Court considers many factors to evaluate voluntariness: whether the police engaged in overreaching; whether the accused was under the influence of pain medication; the general mental status of the accused at the time the statement was given; whether questioning was intense and lengthy, particularly if an accused has been deprived of food or sleep; and the presence or absence of counsel, defendant's awareness of the charges he was facing, and whether he had been advised of his right to counsel. *See, e.g., Colorado v. Connelly*, 479 U.S. 157, 163 (1986) (overreaching); *Beecher v. Alabama*, 408 U.S. 234, 237 (1972) (under the influence of pain medication); *Blackburn v. Alabama*, 361 U.S. 199, 205 (1960) (mental status);

Reck v. Pate, 367 U.S. 433, 441 (1961) (length of questioning); 18 U.S.C. §3501 (listing considerations).

The evidence establishes that plaintiff had been shot at least four times, one of the bullets having penetrated his head. The other bullets entered his chest, abdomen and spinal area, and knee. During the questioning at the hospital, plaintiff repeatedly begged for treatment; he told the officer he believed he was dying eight times; complained that he was in extreme pain on fourteen separate occasions; and twice said he did not want to talk any more.[1] According to the police follow-up report, plaintiff was yelling in pain and was in and out of consciousness. Chavez acknowledged at his deposition that at the time of the questioning, plaintiff "was not doing too good." Officer Chavez also testified that although plaintiff told him at the hospital he did not want to talk to him, the officer continued to ask him questions and did not advise him of his *Miranda* rights.

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[1]The Declaration of Officer Chavez, submitted in Opposition to this Motion, contains the following statement concerning the interview at the hospital: "He never refused to respond to my questions until the end of the interview, at which time I stopped the interview." (McCormick Dec., Ex. F, ¶8.) The transcript of the interview reflects that on two occasions during the interview, plaintiff told the officer he did not want to say anything further, but the questioning continued. (McCormick Dec., Ex. I, at 6, 11.) The Declaration does not create a triable issue of fact.

Certainly, not every interrogation of a wounded suspect in a hospital bed is coercive.[2] However, the totality of the circumstances in this case convinces the Court that plaintiff's statement was not voluntarily given. He had been shot in the face, both eyes were injured; he was screaming in pain, and coming in and out of consciousness while being repeatedly questioned about details of the encounter with the police. The questioning persisted in spite of plaintiff's request for medical treatment and unequivocal statements that he did not want to talk.

The facts of this case are remarkably similar to those in *Mincey v. Arizona*, 437 U.S. 385 (1978). The *Mincey* Court described the circumstances under which the defendant had given his statement.

> He had been seriously wounded just a few hours earlier, and had arrived at the hospital "depressed almost to the point of coma," according to his attending physician. Although he had received some treatment, his condition at the time of Hust's interrogation was still sufficiently serious that he was in the intensive care unit. He complained to Hust that the pain in his leg

[2]Otherwise proper interrogation techniques can produce an involuntary confession where, "in the particular circumstances of the case, the confession is unlikely to have been the product of a free and rational will." (*Miller v. Fenton*, 474 U.S. 104, 110 (1985).)

> was "unbearable." . . . Finally, while Mincey was being questioned he was lying on his back on a hospital bed, encumbered by tubes, needles, and breathing apparatus. He was, in short, "at the complete mercy" of Detective Hust, unable to escape or resist the thrust of Hust's interrogation.

Id. at 398 (footnote omitted). The Supreme Court concluded: "It is hard to imagine a situation less conducive to the exercise of 'a rational intellect and a free will.'" *Id.*

The Court holds, as a matter of law, that plaintiff's statement was coerced in clear violation of his constitutional rights. Accordingly, plaintiff is entitled to summary adjudication of his claims for violations of the Fifth and Fourteenth Amendments. Moreover, because the statement was obtained in violation of the Constitution, it is not admissible at the trial of this case.

2. Claim for Violation of the Eighth Amendment

Plaintiff contends that Chavez's questioning of plaintiff violated his Eighth Amendment right in two ways: by being "deliberately indifferent" to his medical needs and by inflicting "cruel and unusual" punishment. Although plaintiff asserts an Eighth Amendment violation, it is clear that because plaintiff was not a convicted inmate at the time, the Eighth Amendment is inapplicable.

Instead, because plaintiff contends he was detained, these claims are properly viewed as a claim for violation of

the Due Process clause of the Fourteenth Amendment. *See Redman v. County of San Diego*, 942 F.2d 1435, 1440 (9th Cir. 1991) ("the due Process clause protects a pretrial detainee from the use of excessive force that amounts to punishment"). It is clear that deliberate indifference to a detainee's medical needs may rise to the level of a Fourteenth Amendment violation. *See id.* at 1443.

However, because there is insufficient evidence to establish that Chavez's actions interfered with plaintiff's treatment, plaintiff is not entitled to summary adjudication of his claim for violation of the Eighth Amendment.

B. Plaintiff's Stop and Detention

Plaintiff contends that his stop and detention vithout a warrant violated his Fourth Amendment rights. Defendants contend that they had "reasonable suspicion" of illegal narcotics activity in the area and that plaintiff had information about that activity based on his presence in an enclosed area.[3] Moreover, they contend that plaintiff voluntarily consented to the search.

Law enforcement officers may detain a person for the purpose of investigating possible criminal behavior where "reasonable suspicion" of a crime exists. Reasonable suspicion exists when officers are aware of

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[3]It is undisputed that the area was not enclosed although defendants were unaware of that fact at the time they stopped plaintiff.

facts which, taken together with rational inferences from those facts, lead a reasonable person to believe that the person stopped has been, is, or is about to be engaged in criminal activity. *See United States v. Thomas*, 211 F.3d 1186, 1189 (9th Cir. 2000). In general, whether reasonable suspicion existed is a question for the jury. *See McKenzie v. Lamb*, 738 F.2d 1005, 1008 (9th Cir. 1984). Accordingly, "summary judgment is appropriate only if no reasonable jury could find that the officers did or did not have [reasonable suspicion]." *Id.*

The Court cannot conclude that no reasonable jury could find that Peña and Salinas did not have reasonable suspicion sufficient to stop plaintiff. Peña's first-hand knowledge of drug paraphernalia at the site, the report from the neighbors of drug activity, and defendants' mistaken belief that the field was enclosed, create a genuine issue of fact as to whether the defendants had reasonable suspicion to stop plaintiff. Because a genuine issue of material fact exists, plaintiff is not entitled to summary adjudication of his claim for violation of the Fourth Amendment.

V. Qualified Immunity

At the hearing on plaintiff's motion, defendants moved for summary adjudication of the issue of qualified immunity for Chavez's interview of plaintiff, which as explained above, violated the Constitution. Because neither party addressed the issue in briefing on plaintiff's motion for summary adjudication, the Court ordered supplemental briefing on the issue. After reviewing the

parties' submissions, the Court issues the following decision:

Public officials exercising discretionary authority are entitled to qualified immunity from suit where their actions "[do] not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *see also Anderson v. Creighton*, 483 U.S. 635, 638 (1987). In determining whether defendants are entitled to qualified immunity, the Court must consider (1) whether the plaintiffs have identified a specific federal statutory or constitutional right that has been allegedly violated, (2) whether that right was so clearly established as to alert a reasonable official to its parameters, and (3) whether a reasonable official could have believed his or her conduct was lawful. *See Sweany v. Ada County, Idaho*, 119 F.3d 1385, 1388 (9th Cir. 1997).

Plaintiff points to *Miranda v. Arizona*, 384 U.S. 436 (1996), and *Miller v. Fenton*, 474 U.S. 104 (1985) to support his argument that the contours of the Fifth Amendment right to *Miranda* warnings and Fourteenth Amendment bar against involuntary confessions were sufficiently defined at the time of his questioning by Chavez. Defendants agree that:

> leading coercive custody decisions [forbid]: examination after request for counsel; examination after expression of a prompt, unequivocal intent not to speak; multi-hour examination; multi-officer presence in a police dominated environment; strong-arm tactics, such as conjured fears, deprivations, berating; and knowing attempts to abridge the right against self-incrimination to extract self-inculpatory data or leads.

(Def's Memo. 20:20-24.) In this case, many of the forbidden practices delineated by defendants were engaged in by Chavez during the interview.

Defendants argue that plaintiff never told Chavez to leave or requested to be left alone. However, on several occasions plaintiff told Chavez "I am not telling you anything until they treat me," and "I don't want to say anything anymore." (Mercado Dec., Ex. 2, p. 6, 11.) These statements clearly communicate plaintiff's "intent not to speak." Plaintiff's requests, made among many other pleas for treatment, are sufficient to put a reasonable officer on notice that plaintiff was not speaking voluntarily.

Defendants argue that a reasonable officer might have thought a "ten-minute, seven-second examination" did not violate the Constitution. Although plaintiff's answers to Chavez's questions may have produced only ten minutes of tape recording, it is undisputed that the interview was conducted intermittently for approximately 45 minutes. (McCormick Dec., Ex. F. Chavez Dec., 126:12-13.) In light of the fact that plaintiff was suffering excruciating pain and being prepared for emergency surgery, forty-five minutes is an excessively lengthy interview. The fact that Chavez returned to continue questioning plaintiff after being repeatedly ushered out of

the room by medical personnel exacerbates the coercive nature of the interview.

Defendants contend that because Chavez did not use strong-arm tactics such as physical violence or coercive threats to elicit the statement, he is entitled to qualified immunity. It is true that Chavez did not inflict pain on plaintiff. The bullets fired from another officer's gun into plaintiff's head, abdomen and knee had inflicted ample pain to overcome plaintiff's will. The Court cannot image what Chavez or any other officer could do in an interrogation room that would cause additional pain to one who is blind because of a gunshot wound to the head and paralyzed from another to his abdomen. Moreover, Chavez repeatedly told plaintiff he was dying. Although plaintiff also stated that he thought he was dying, reinforcement of this fear from a police officer is psychologically coercive.

Finally, defendants argue that Chavez was not attempting to abridge the right against self-incrimination to extract self-inculpatory data or leads:

> There was no point in Sgt. Chavez's trying to build a criminal case against a man who was about to expire; plainly, there would have been no one to prosecute. Even if he had survived, as he in fact did, no prosecutor would bring charges against a person who had not succeeded in injuring

> the officers in any way and had himself been gravely disabled.

(Def's Memo. 12:3-7.) At the time Chavez was interviewing plaintiff, he had no knowledge of whether or not a prosecutor would charge plaintiff if he survived. Moreover, the Court has no statement from Chavez that he did not believe plaintiff would ever be charged. Defendants' argument is speculative hindsight. At the time he questioned plaintiff, Chavez believed that plaintiff had attempted to shoot two police officers — a serious crime indeed. Whatever decision would be reached later about prosecution, the Court cannot conclude that Chavez would not have investigated thoroughly this serious crime.

Moreover, because this was an officer-involved shooting, Chavez was clearly trying to obtain information that could clear the officers of wrong-doing. Although this information is not protected by the Fifth Amendment, Chavez's motivation was certainly not to assist plaintiff.

The law against coerced confessions was clearly established at the time of plaintiff's interview. The Court concludes that no reasonable officer would believe that an interview of an individual receiving treatment for life-threatening injuries that resulted in blindness, paralysis, and excruciating pain was constitutionally permissible. Moreover, plaintiff, on several occasions, told Chavez that he did not want to talk; that he wanted to be treated. Given the circumstances of plaintiff's interview and established constitutional boundaries, the Court concludes that Chavez is not entitled to qualified immunity.

VI. Conclusion

Plaintiff's motion for summary adjudication, filed June 5, 2000, is granted in part and denied in part. Plaintiff is entitled to summary adjudication of his §1983 claims for violation of the Fifth and Fourteenth Amendment based on his questioning while in the hospital. Chavez is not entitled to qualified immunity for interviewing plaintiff at the hospital.

IT IS SO ORDERED. /s/ Florence-Marie Cooper
FLORENCE-MARIE COOPER, JUDGE
July 31, 2000 UNITED STATES DISTRICT COURT

APPENDIX C— ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING THE PETITION FOR REHEARING FILED DECEMBER 26, 2001

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

OLIVERIO MARTINEZ, Plaintiff – Appellee, v. CITY OF OXNARD; OXNARD POLICE DEPARTMENT; ART LOPEZ, Chief; MARIA PEÑA; ANDREW SALINAS; RON ZAVALA, Defendants, and	)	Case No. 00-56520 D.C. No. CV-98-09313-FMC (Central Dist. Calif.) ORDER

BEN CHAVEZ,

Defendant – Appellant.

Before: WARDLAW, PAEZ and TALLMAN, Circuit Judges.

The panel has voted to deny the Petition for Rehearing and Suggestion for Rehearing En Banc. The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to hear the matter en banc. Fed. R. App. 35(b).

The Petition for Rehearing En Banc and Suggestion for Rehearing En Banc is DENIED.